Supreme Court, U.S.
FILED
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JULY 10, 2001
CERTIORARI GRANTED: OCTOBER 15, 2001

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NOTICE

The following items have been omitted in printing this Appendix because they appear on the following pages in the printed and separately-bound appendix to the petition for a writ of certiorari:

Order of Presiding Administrative Law Judge Norman D. Kline entitled "Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint Granted" (dated Jan. 5, 2000)	39a

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Opinion of the court of appeals (dated March 12, 2001). . 1a

FEDERAL MARITIME COMMISSION

Docket No. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/99	Received Complaint.
10/27/99	Served Notice of Filing of Complaint and Assignment. (Initial decision due October 27, 2000; final decision due April 9, 2001).
10/28/99	Served Notice of Assignment by ALJ Norman D. Kline.
11/16/99	Received Answer.
11/19/99	Received Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint.
12/6/99	Received Complainant's Response to Respondent's Motion to Dismiss.
12/9/99	Served Order to Supplement the Record.
12/27/99	Received Complainant's Supplementation of its Response to Respondent's Motion to Dismiss.

DATE	PROCEEDINGS
1/5/00	Served Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint Granted.
2/3/00	Served Notice of Filing of Commission Review.
3/23/00	Served Order Reversing the Administrative Law Judge's Order and Remanding for Further Proceeding.
3/31/00	Served Notice of Prehearing Conference.
4/4/00	Served Notice of Additional Matters to be Discussed at Prehearing Conference.
4/5/00	Served Notice of Cancellation of Prehearing Conference.
4/20/00	Received Motion of South Carolina State Ports Authority for a Stay of Proceeding Pending Review.
5/10/00	Served Respondent's Motion to Stay Proceeding Pending Judicial Review Granted.
10/26/00	Served Notice of Suspension of Procedural Schedule.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA STATE PORTS AUTHORITY

v.

FEDERAL MARITIME COMMISSION, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/21/00	Petition for review filed [3173157-1] (dhb)
4/24/00	Agency review docketed. (dhb)
	* * * * *
5/16/00	Certified list filed in lieu of record. [00-1481] (dhb)
	* * * * *
7/20/00	Brief joint appendix filed by Petitioner SC State Ports Auth. Type of Service: HD Copies of brief: 8 # brf pages: 56 Copies of apx: 6 # apx pages: 225 Sufficient?[Y/N]: Y 2-sided copying: Y [00-1481] Respondent brief due 8/21/00 for US, for FMC. (aww)
	* * * * *
8/1/00	Amicus curiae brief filed by Amicus Curiae State of Maryland, Amicus Curiae State of Alabama, Amicus Curiae State of Arkansas, Amicus Curiae State of Connecticut, Amicus Curiae State of Delaware, Amicus Curiae State of Florida, Amicus Curiae State of

DATE	PROCEEDINGS
	Georgia, Amicus Curiae State of Iowa, Amicus Curiae State of Louisiana, Amicus Curiae State of Maine, Amicus Curiae State of Mississippi, Amicus Curiae State of Montana, Amicus Curiae State of Nevada, Amicus Curiae State of NC, Amicus Curiae State of ND, Amicus Curiae State of Oklahoma, Amicus Curiae State of Oregon, Amicus Curiae State of SC, Amicus Curiae State of SD, Amicus Curiae State of Virginia, Amicus Curiae State of WV. Type of Service: Per Clerk Order # am.br copies: 8 Sufficient[Y/N]?: Y.. [00-1481] (aww)
	* * * * *
9/11/00	Amicus curiae brief filed by Amicus Curiae NAWE. Type of Service: Per Clerk Order # am.br copies: 8 Sufficient[Y/N]?: Y. . [00-1481] (aww)
9/20/00	Brief filed by Respondent FMC. Type of Service: CD Copies: 8 # brf pages: 85. Sufficient [Y/N]: Y. .. [00-1481] (aww)
9/20/00	Brief filed by Respondent US. Type of Service: PM Copies: 8 # brf pages: 48. Sufficient [Y/N]: y. .. [00-1481] (wtc)
	* * * * *
10/18/00	Reply brief filed by Petitioner SC State Ports Auth. Type of Service: CD Copies of brief: 8 # brf pages: 216. Sufficient [Y/N]: Y. .. [00-1481] (aww)
	* * * * *
12/15/00	COURT ORDER filed granting motion of State of Maryland to participate in oral arg on

DATE	PROCEEDINGS
	the time ceded by petitioner [3281366-1], denying motion of NAWE to participate in oral arg [3270266-1] Copies to all counsel. [00-1481] (dhb)
12/29/00	Motion filed by Petitioner SC State Ports Auth, Respondent FMC, Respondent US for additional argument time of 30 minutes [3308624-1]. [00-1481] (db)
1/3/01	ORDER FILED granting motion for additional argument time [3308624-1]. Copies to all counsel. [00-1481] (mst)
1/22/01	Oral argument heard. Courtroom Deputy: JLC, Jr. [00-1481] (jc)
	* * * * *
3/12/01	Published, authored opinion filed. [00-1481] (dhb)
3/12/01	Judgment order filed. Decision: reversed and remanded with instructions to dismiss. EOD Date: 3/12/01. [00-1481] (dhb)
4/25/01	Federal Reporter Citation: 243 F.3d 165. [00-1481] (vsł)
5/2/01	Motion filed by Respondent FMC to stay the mandate pending petition for writ of certiorari [00-1481] (dhb)
5/4/01	COURT ORDER filed denying motion to stay mandate [3380542-1] Copies to all counsel. [00-1481] (dhb)
5/4/01	Mandate issued. [00-1481] (dhb)
5/23/01	Notice of Supreme Court action taken. Type of action taken: extension of time granted for filing certiorari. [00-1481] (jh)

DATE	PROCEEDINGS
7/16/01	Supreme Court notice that petition for certiorari was filed on 07/10/01. Spct No.: 01-46 Spct Pty 1: Federal Maritime Commission Spct Pty 2: SC State Ports Authority. [00-1481] (dhb)
10/19/01	Supreme Court order received granting petition certiorari [3421886-1] on 10/15/01. [00-1481] (dhb)

BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 99-21

[Filed Oct. 25, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

COMPLAINT

NOW COMES South Carolina Maritime Services, Inc. ("Maritime Services"), as complainant, and files this complaint against the South Carolina State Ports Authority ("Ports Authority"), respondent herein, showing the Commission as follows:

PARTIES

1. Maritime Services is a corporation organized and existing under the laws of South Carolina with a principal place of business at 44 Seagrass Lane, Isle of Palms, South Carolina 29451. Maritime Services is the charterer of the M/V TROPICANA a/k/a M/V TROPIC SEA and is a common carrier engaged in the business of providing transportation of passengers for hire.

2. The Ports Authority, upon information and belief, is a political agency, entity, body and/or subdivision of the State of South Carolina, and is a marine terminal operator engaged in the business of furnishing wharfage and other terminal

facilities in connection with ocean common carriage. The Ports Authority's address is P.O. Box 22287, Charleston, South Carolina 29413-2287.

JURISDICTION AND VENUE

3. Jurisdiction is proper under the Shipping Act of 1984, 46 U.S.C. §§ 1701 - 1721, which regulates, among other things, marine terminal operators and persons engaged in the United States in the business of furnishing wharfage and other terminal facilities in connection with common carriage.

STATEMENT OF FACTS

The Charter Party

4. On or about November 9, 1998, Maritime Services entered into a time charter party with Jubilee of the Bahamas, Inc. ("Jubilee"), the owner of the M/V TROPIC SEA. Pursuant to the terms of the charter party, Maritime Services is to provide and pay for all costs relating to passenger service matters, including embarkation, debarkation, the hotel department, catering, beverage service, entertainment, shore excursions, concessionaire operations, cleaning, hotel department equipment, passenger accommodation, and all deck areas accessible to the public. Maritime Services is also to pay for fuel and lube oils, port charges, pilotage, boatage, tug assistance, taxes, and all dock, harbor and tonnage dues. Maritime Services is to pay charter hire at the rate of $17,500 per day.

The Vessel

5. The M/V TROPIC SEA is a 383' ocean-going passenger vessel owned by Jubilee and operated by Tropicana Cruises International, Inc. The vessel's port registry is Nassau, Bahamas. The M/V TROPIC SEA is a foreign-flagged vessel flying the Bahamian flag. The M/V TROPIC SEA is certified by Lloyd's Register of Shipping as

being in compliance with her class standards, as defined by the laws of the Commonwealth of The Bahamas.

6. The M/V TROPIC SEA is equipped with six decks, five of which are designated for passenger access. The "A" deck contains ten officer's staterooms and passenger staterooms. The "B" deck is equipped with a small casino, bar, gift shop, main lounge with bar, and open deck featuring a bar and swimming pool. The "C" deck contains buffet tables, a bar, a restaurant, and the main casino. The "D" deck contains passenger staterooms, the main galley, officer and staff mess area, and additional machinery spaces. The "E" deck contains passenger staterooms, refrigeration and freezer space for food storage, and machinery spaces. The "Tank Top" deck contains the main engine room and potable water tanks. The "Bridge" deck houses the wheel house and various stacks and vents.

7. The two casinos on the M/V TROPIC SEA feature blackjack tables, roulette wheels, crap tables, a mini-baccarat table, stud poker tables, and video poker machines.

Maritime Services' Operations From The Port of Charleston

8. Maritime Services intends to offer passenger cruises from the Port of Charleston consisting of "cruises to nowhere" and cruises to The Bahamas. Maritime Services intends to offer "cruises to nowhere," whereby the M/V TROPIC SEA will depart from Charleston, proceed to international waters for a period of hours and then return to Charleston with no intervening ports of call. While the vessel is in international waters, passengers may enjoy the benefit of gambling in the vessel's casinos. Maritime Services also intends to offer cruises to The Bahamas, which will consist of a three-day voyage from Charleston to The Bahamas, and back again

9. During these voyages, Maritime Services will offer numerous activities for its passengers, including dining service, bar service, entertainment (including dancing, live

musicals, piano bar, and live band), bingo, casino games, and various games for the passengers' children. Gambling operations will only be conducted while the vessel is in international waters, and will not occur in South Carolina territorial waters.

Maritime Services' Negotiations With The Port Authority To Obtain Berthing Space And Passenger Services For The M/V TROPIC SEA

10. By letter dated November 24, 1998, addressed to William A. McClean ("McClean"), Vice President of Operations for the Ports Authority, Frank Guarino ("Guarino"), President of Maritime Services, requested berthing space for the M/V TROPIC SEA for December 17 - 20 and 31, 1998, as well as January 1 - 3, 1999. Maritime Services also requested information on any and all fees, tariffs, taxes or port charges associated with the berthing space.

11. By letter dated December 10, 1998, McClean rejected Maritime Services request for berthing space, citing City of Charleston Ordinance Section 21-176, which prohibits the operation of gaming vessels within the corporate limits of Charleston.

12. By letter forwarded via facsimile dated June 24, 1999, to McClean, Guarino requested berthing space for the vessel on July 1 - 5, 1999. Maritime Services again requested information on any and all fees, tariffs, taxes or port charges associated with the berthing space.

13. By letter dated June 28, 1999, McLean rejected Maritime Services' request for berthing space, again citing City of Charleston Ordinance Section 21-176.

14. By letter dated July 7, 1999, addressed to "Marketing/Sales, State Port Authority," M.J. Shaw ("Shaw"), General Manager and Director of Operations for Maritime Services, demanded berthing space for the M/V TROPIC SEA at the Ports Authority. In the facsimile,

Maritime Services advised the Ports Authority that the charter hire for the vessel was costing Maritime Services approximately $18,000.00 per day.

15. By facsimile dated July 8, 1999, Suzanne M. Kaiser ("Kaiser"), the Special Projects Coordinator for the Ports Authority, replied to Maritime Services that the Ports Authority could not accommodate berthing space for the M/V TROPIC SEA because the vessel is a gaming ship and the Ports Authority's policy prohibits berthing of gaming vessels.

16. By letter dated July 14, 1999, addressed to McLean, Maritime Services, pursuant to the request of the Ports Authority, set forth in writing its intentions for its passenger cruise business in Charleston. Maritime Services noted that it was again requesting berthing space for the M/V TROPIC SEA for "passenger cruises." These cruises would include regular voyages to The Bahamas and candlelight "cruises to nowhere" from the Port of Charleston. Maritime Services offered to provide security for any financial concerns the Ports Authority might have.

17. By letter dated July 17, 1999, addressed to Kaiser, Maritime Services requested a meeting with the Ports Authority to resolve the berthing issue.

18. By letter dated July 19, 1999, legal counsel for the Ports Authority denied Maritime Services' request for berthing space. Counsel advised that the M/V TROPIC SEA is a gaming vessel and the policy of the Ports Authority is not to provide facilities for gaming vessels.

19. On or about August 12, 1999, Shaw, Guarino, and counsel for Maritime Services met with Anne Moise, Kaiser, and counsel for the Ports Authority wherein Maritime Services again requested berthing space at the Ports Authority. The representatives of the Ports Authority advised that the Ports Authority would not provide berthing space because the Ports Authority had a policy, approved by its Board, against permitting gaming ships to utilize its passenger terminal.

20. By letter dated August 13, 1999, addressed to Kaiser, Maritime Services advised the Ports Authority that its actions in refusing to provide a berth for the M/V TROPIC SEA constitute a violation of The Shipping Act of 1984, 46 U.S.C. §§ 1701-1721. Specifically, Maritime Services advised the Ports Authority that its actions in refusing to provide a berth violated 46 U.S.C. § 1709(d)(3) of the Act, which prohibits marine terminal operators such as the Ports Authority from giving any undue or unreasonable preference or advantage to any person or imposing any undue or unreasonable prejudice or disadvantage to any person. Maritime Services noted that the Ports Authority had refused to provide a berth for the MV/TROPIC SEA because it is a gaming vessel. Yet, the Ports Authority continued to provide berthing space and passenger services for other cruise lines offering gambling during "cruises to nowhere" and other cruises.

21. By letter dated August 24, 1999, counsel for the Ports Authority again denied Maritime Services' request for a berthing space for the vessel. Again, the Ports Authority stated that its policy prohibits providing space for vessels whose primary purpose is gambling.

Ports Authority's Dealings With Other Vessels Operating "Cruises To Nowhere"

22. Prior to May 28, 1999, Carnival Cruise Lines advertised overnight "cruises to nowhere" aboard the M/S INSPIRATION, which would depart Charleston on Friday, May 28, 1999, and Saturday, September 11, 1999, returning to Charleston the following day with no intervening ports of call. For both "cruises to nowhere" aboard the M/S INSPIRATION, the vessel provided gambling activities to the passengers while the vessel was in international waters. Gambling was conducted in the vessel's 7500 square foot casino, which features slot machines, blackjack, roulette, Caribbean stud poker, wheel of fortune, bingo, and MegaCash, advertized by Carnival as the world's largest cruise ship jackpot.

23. The M/S INSPIRATION is an 855' ocean-going passenger vessel, flying the foreign flag of Panama. During the "cruises to nowhere" from Charleston, Carnival offered numerous activities for its passengers, including dining service, bar service, entertainment, bingo, casino games, and various other services. Gambling operations were conducted while the vessel was in international waters, and did not occur while the vessel was in South Carolina territorial waters.

24. Despite the Ports Authority's policy of refusing to provide berthing space to gaming vessels, the M/S INSPIRATION boarded passengers on May 28, 1999, and September 11, 1999, at the Ports Authority's cruise ship terminal for these "cruises to nowhere."

25. Upon information and belief, the Ports Authority assessed charges against Carnival as set forth in the Ports Authority's "Terminal Tariff No. 8, Cruise Activity Charges," which sets forth the Ports Authority's per passenger charge as well as an additional charge for providing parking for the passengers' automobiles for these "cruises to nowhere." Passengers utilizing the Ports Authority's terminal for these "cruises to nowhere" aboard the M/V INSPIRATION were provided "cruise parking permits" by the Ports Authority. Upon information and belief, the Ports Authority also assessed other charges against Carnival for dockage, wharfage, and other services provided.

26. Presently, Carnival is advertising additional cruises from Charleston, including a two-night "cruise to nowhere" aboard the M/V CARNIVAL DESTINY on Friday, May 12, 2000, and a one-night "cruise to nowhere" aboard the M/V CARNIVAL VICTORY on Friday, October 6, 2000. As with the M/S INSPIRATION, these vessels will provide gambling in the vessels' casinos while the vessels are in international waters, and will depart and return to the Port of Charleston with no intervening ports of call. Carnival is also advertising a four-night cruise to The Bahamas, departing Charleston on Saturday, October 7, 1999.

27. Upon information and belief, the Ports Authority, pursuant to an agreement with Carnival, will provide berthing for Carnival's vessels at the Ports Authority's cruise ship terminal, and will assess per passenger charges and charges for parking at the rate set forth in the Ports Authority's tariff.

COUNT ONE - VIOLATION OF THE SHIPPING ACT INJUNCTIVE RELIEF

28. Maritime Services realleges and incorporates paragraphs 1 through 27 as if they were set forth herein.

29. The Shipping Act of 1984, 46 U.S.C. §§ 1701-1721, regulates, among other things, marine terminal operators and persons engaged in the United States in the business of furnishing wharfage and other terminal facilities in connection with common carriage.

30. Section 1709(b)(10) of the Shipping Act provides that no marine terminal operator, either alone or in conjunction with any other person, directly or indirectly, may unreasonably refuse to deal or negotiate. Section 1709(d)(4) of the Shipping Act provides that no marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

31. The Ports Authority is a marine terminal operator within the meaning of the Shipping Act and is subject to the Shipping Act's prohibitions.

32. The Ports Authority's policy of not dealing with gaming vessels constitutes an unreasonable refusal to deal or negotiate and is unreasonably discriminatory in that the Ports Authority refuses to provide berthing space to Maritime Services for its "cruises to nowhere" and cruises to The Bahamas, yet provides berthing space to Carnival for its "cruises to nowhere" and cruises to The Bahamas. The Ports Authority's policy gives undue and unreasonable preference to cruise lines such as Carnival and imposes an undue and

unreasonable prejudice or disadvantage with respect to Maritime Services.

33. Pursuant to Section 1710(h) of the Shipping Act, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act. Maritime Services hereby respectfully requests that the Commission file suit against the Ports Authority in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction enjoining the Ports Authority from engaging in its unreasonably discriminatory policy of refusing to provide berthing space and passenger services to Maritime Services for its cruises while at the same time providing berthing space and passenger services to cruise lines, such as Carnival, for its cruises.

COUNT TWO - VIOLATION OF THE SHIPPING ACT REPARATIONS

34. Maritime Services realleges and incorporates paragraphs 1 through 33 as if they were fully set forth herein.

35. Section 1710(g) of the Shipping Act provides that the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury, including loss of interest plus reasonable attorneys' fees.

36. Maritime Services hereby petitions the Commission to recover reparations from the Ports Authority for the Ports Authority's violations of the Shipping Act, specifically Sections 1709(b)(10) and 1709(d)(4), which caused actual injury to Maritime Services, including but not limited to loss of profits, loss of earnings, loss of sales, and loss of business opportunities. Maritime Services also seeks recovery of lost interest as well as its reasonable attorneys' fees incurred in the pursuit of this matter.

WHEREFORE, Maritime Services respectfully demands judgment and prays as follows:

(A) That this Commission seek a temporary restraining order and preliminary injunction in the United States District Court for the District of South Carolina, Charleston Division, enjoining the Ports Authority from utilizing its discriminatory practice to refuse to provide berthing space and passenger services to Maritime Services;

(B) That this Commission, after due notice and hearing, direct payment of reparations by the Ports Authority to Maritime Services, including sums sufficient to compensate Maritime Services for its actual injuries caused by the Ports Authority's discriminatory practices, as well as interest and reasonable attorneys' fees.

(C) That this Commission, after due notice and hearing, issue an order commanding the Ports Authority to cease and desist from the aforesaid violations of the Shipping Act; to establish and put in force such practices as the Commission determines to be lawful and reasonable; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

(D) That this Commission award Maritime Services such other and further relief as is just and proper.

Respectfully submitted this 20th day of October, 1999

SOUTH CAROLINA MARITIME
SERVICES, INC.
By: /s/ Frank Guarino
Frank Guarino, President

44 Seagrass Lane
Isle of Palms, South Carolina 29451
(843) 886-5600

HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
By: /s/ George M. Earle
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VERIFICATION

State of South Carolina

County of Charleston

Frank Guarino, being duly sworn on oath, deposes and says that he is the President of South Carolina Maritime Services, Inc., complainant herein, and is the person who signed the foregoing complaint; that he has read the complaint and that the facts stated therein, upon information received from others, affiant believes to be true.

SOUTH CAROLINA MARITIME
SERVICES, INC.
By: /s/ Frank Guarino
Frank Guarino, President

44 Seagrass Lane
Isle of Palms, South Carolina 29451
(843) 886-5600

Sworn to and subscribed before me this
20th Day of October, 1999.
/s/ Mary B. Creech
Notary Public
My Commission Expires: 9-14-05

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Nov. 16, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

ANSWER OF THE SOUTH CAROLINA STATE PORTS AUTHORITY

[Caption and List of Counsel Omitted in Printing]

ANSWER

Respondent South Carolina State Ports Authority ("SPA") files this answer to the Complaint of South Carolina Maritime Services, Inc. The SPA will file a Motion to Dismiss shortly. The Complaint is a wrongful attempt to invoke the Commission's jurisdiction. Congress, through the Johnson Act,[1] has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels. The State of South Carolina, through statute and case law, prohibits gambling junkets, and the SPA will not permit its cruise facilities to be used to provide such services. Rather, the SPA's policy allows cruise ships to use its facilities only where gaming activities are not the primary purpose of the cruise.

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[1] Johnson Act, 15 U.S.C. § 1175. *See Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999).

The SPA has adhered to its policy in a non-discriminatory manner; however, should any determination be made to the contrary, the SPA will deny facilities to all vessels departing from and returning to Charleston for short-term "cruises to nowhere" with gambling devices on board, even where the primary purpose of the cruise is not gambling.

The following responds to each paragraph of the Complaint:[2]

PARTIES

1. The SPA, based upon information and belief, admits that Maritime Services is a corporation under the laws of South Carolina with a principal place of business at 44 Seagrass Lane, Isle of Palms, South Carolina 29451. Further, based on information and belief, the SPA admits Maritime Services is the charterer of the M/V TROPICANA, which is also known as the M/V TROPIC SEA. The SPA denies that Maritime Services is a common carrier engaged in the business of providing transportation of passengers for hire. Indeed, the SPA believes that Maritime Services is not authorized by either the Commission or the Coast Guard to engage in common carriage of passengers.

2. The SPA admits that it is an agency of the State of South Carolina. In addition, the SPA admits that it is a marine terminal operator at the Port of Charleston. The SPA denies it is a marine terminal operator with respect to all of its functions. The SPA admits its address is P.O. Box 22287, 176 Concord Street, Charleston, South Carolina 29413.

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[2] No discovery accompanied the Complaint. The SPA reserves the right under Rule 201 to commence discovery at an appropriate time should the Commission not grant the SPA's forthcoming Motion to Dismiss.

JURISDICTION AND VENUE

3. The SPA denies that jurisdiction before the Federal Maritime Commission is proper under the Shipping Act of 1984.

STATEMENT OF FACTS

The Charter Party

4. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 4 of the Complaint and therefore denies the same.

The Vessel

5. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 5 of the Complaint and therefore denies the same.

6. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 6 of the Complaint and therefore denies the same.

7. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 7 of the Complaint and therefore denies the same.

8. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 8 of the Complaint and therefore denies the same. Further, the SPA cannot know the future intentions of third parties.

9. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 9 of the Complaint and therefore denies the same. Further, the SPA cannot know the future intentions of third parties.

10. The SPA admits the existence of a letter dated November 24, 1998, addressed to William A. McLean, Vice President of Operations for the SPA. The content of said letter speaks for itself.

11. The SPA admits the existence of a letter dated December 10, 1998, from Mr. McLean. The content of said letter speaks for itself.

12. The SPA admits the existence of an undated letter addressed to Mr. McLean sent on or about June 24, 1999. The content of said letter speaks for itself.

13. The SPA admits the existence of a letter dated June 28, 1999, from Mr. McLean. The content of said letter speaks for itself.

14. The SPA admits the existence of a letter dated July 7, 1999, addressed to "Marketing/Sales, State Port Authority." The content of said letter speaks for itself.

15. The SPA admits the existence of a letter dated July 8, 1999, from Suzanne M. Kaiser. The content of said letter speaks for itself.

16. The SPA admits the existence of a letter dated July 14, 1999, addressed to Mr. McLean. The content of said letter speaks for itself.

17. The SPA admits the existence of a letter dated July 17, 1999, addressed to Ms. Kaiser. The content of said letter speaks for itself.

18. The SPA admits the existence of a letter dated July 19, 1999, from legal counsel for the SPA. The content of said letter speaks for itself.

19. The SPA admits that a meeting occurred on August 12, 1999. The SPA is without sufficient information to either deny or admit the remaining allegations in paragraph 19 and therefore denies the same. But, the SPA admits that its policy prohibits it from providing facilities to gaming vessels. The SPA admits the M/V TROPIC SEA is a gaming vessel and cannot be accommodated at an SPA terminal.

20. The SPA admits the existence of a letter dated August 13, 1999, addressed to Ms. Kaiser. The content of said letter speaks for itself.

21. The SPA admits the existence of a letter dated August 24, 1999, from legal counsel for the SPA. The content of said letter speaks for itself.

22. The SPA lacks sufficient knowledge or information upon which to either admit or deny the allegations regarding Carnival Cruise advertisements in paragraph 22, and therefore denies the allegations. The SPA does, however, admit that the M/S INSPIRATION called at Charleston on September 11-12, 1999, as described in paragraph 24 below.

23. The SPA admits that the M/S INSPIRATION is an 855' ocean-going passenger vessel. It lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 23 of the Complaint and therefore denies the same.

24. The SPA admits that the M/S INSPIRATION called the Port of Charleston on September 11-12, 1999. Upon information and belief, the SPA believes that the M/S INSPIRATION embarked and disembarked passengers at Charleston on those days. The SPA lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 24 of the Complaint and therefore denies the same.

25. The SPA admits the existence of "Terminal Tariff No. 8." The terms of said tariff, which can be found at http://www.port-of-charleston.com/tariff8.htm, speak for themselves. The SPA lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 25 of the Complaint and therefore denies the same.

26. The SPA lacks sufficient knowledge or information upon which to either admit or deny the allegations in paragraph 26 of the Complaint and therefore denies the same.

27. The SPA denies that it has an agreement with Carnival Cruise Lines of the nature described in

paragraph 27 of the Complaint. It lacks sufficient information to either admit or deny the allegations regarding Carnival's future plans, and therefore denies the same. With regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming.

COUNT ONE – VIOLATION OF THE SHIPPING ACT INJUNCTIVE RELIEF

28. To the extent Maritime Services realleges and incorporates paragraphs 1 through 27 as paragraph 28 of the Complaint, Respondent incorporates its responses to paragraphs 1 through 27 as its response to paragraph 28.

29. Paragraph 29 of the Complaint calls for a legal conclusion to which no response is required. To the extent a response is required, the terms of the Shipping Act of 1984 speak for itself.

30. Paragraph 30 of the Complaint calls for a legal conclusion to which no response is required. To the extent a response is required, the terms of 49 U.S.C. §§ 1709(b)(10) and 1709(d)(4) speak for themselves.

31. The SPA admits that it is a marine terminal operator with regard to some of its functions, and therefore subject to the Shipping Act, but denies that it is a marine terminal operator with regard to all its functions.

32. The SPA denies the allegations contained in paragraph 32 of the Complaint.

33. The statute speaks for itself. Further, the SPA denies that it is appropriate for the Federal Maritime Commission to file suit against the SPA in the U.S. District Court for the District of South Carolina. The SPA will file a motion to dismiss the complaint in this docket, which further describes the SPA's position on this issue.

COUNT TWO — VIOLATION OF THE SHIPPING ACT REPARATIONS

34. To the extent Maritime Services realleges and incorporates paragraphs 1 through 33 as paragraph 34 of the Complaint, Respondent incorporates its responses to paragraphs 1 through 33 as its response to paragraph 34.

35. The contents of the statute speak for itself.

36. The SPA denies that Maritime Services is entitled to reparations of any kind.

AFFIRMATIVE DEFENSES

In further answer and defense to Complainant's claims, the SPA states:

FIRST AFFIRMATIVE DEFENSE

Maritime Services is not a common carrier within the meaning of the Shipping Act of 1984.

SECOND AFFIRMATIVE DEFENSE

The Federal Maritime Commission does not have jurisdiction over the matter complained of in Maritime Services' Complaint. Congress, through the enactment of the Johnson Act,[3] has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels.

THIRD AFFIRMATIVE DEFENSE

The Eleventh Amendment of the U.S. Constitution prohibits suits by private parties for reparations against the SPA.

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[3] Johnson Act, 15 U.S.C. § 1175. *See Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999).

FOURTH AFFIRMATIVE DEFENSE

The berthing policy of the SPA regarding gaming vessels is a proper exercise of State of South Carolina's police power.

FIFTH AFFIRMATIVE DEFENSE

Maritime Services' Complaint fails to state a claim for which relief may be granted. In the alternative, if the Commission determines that the complaint states a claim cognizable under the Shipping Act, the SPA will take appropriate remedial measures to eliminate any perceived discrimination or undue preference, as described on page 1 of this Answer.

WHEREFORE, the South Carolina State Ports Authority respectfully requests judgment in its favor.

Respectfully submitted,
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ATTORNEYS FOR SOUTH CAROLINA STATE PORTS AUTHORITY

[Certificate of Service Omitted in Printing]

VERIFICATION

State of South Carolina
County of Charleston,

ss:

I, L Duane Grantham, being duly sworn on oath state that I am Executive Vice President of the South Carolina State Ports Authority and am the person who signed the foregoing answer; that I have read the answer and believe the facts stated therein to be true, based upon information known to myself and obtained from others.
/s/ L. Duane Grantham

SUBSCRIBED & SWORN to before me, a notary public in and for the State of South Carolina, County of Berkeley this 15 day of November, 1999.
/s/ Debra E. Thomas
My Commission expires: 11/2/2008

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Nov. 19, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT

[List of Counsel Omitted in Printing]

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[Caption Omitted in Printing]

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT

Respondent South Carolina State Ports Authority respectfully moves the Presiding Officer to dismiss the Complaint, which is a wrongful attempt to invoke the Commission's jurisdiction. The Complaint contends that the SPA has run afoul of the Shipping Act by refusing berth to a gaming vessel. But federal law, by its terms, does not preempt state laws that prohibit or regulate gaming activities within their borders. Indeed, in the Johnson Act, Congress expressly preserved the rights of states to regulate gaming. It withdrew all federal regulation over gambling conducted in state territorial waters, and permitted states to regulate gambling on vessels, even for voyages outside of those territorial waters. Thus, under the Johnson Act, the State of South Carolina remains free to regulate gambling and gaming devices within and beyond its territorial waters.

The vessel for which Complainant seeks berth at the Port of Charleston is a gaming vessel. As configured, the TROPIC SEA is objectively distinguishable from passenger cruise vessels in that it does not have overnight accommodations for every passenger, and the majority of its space is dedicated to gambling activities. Further, its proposed operations differ markedly from those of cruise lines. Its charterer, South Carolina Maritime Services, Inc. (Maritime Services), has indicated to the SPA its intention to provide regularly scheduled gambling junkets beyond the three-mile limit. By contrast, cruise lines embark or disembark passengers at the Port of Charleston on international cruises, and they make brief port calls on such cruises. On rare occasions, such as the May 28-29, 1999 Carnival overnight cruises referred to in paragraph 22 of the Complaint, a cruise operator has offered novelty cruises for promotional purposes. Thus, both the Complainant's vessel

and the primary purpose of its proposed voyages are objectively distinguishable from others operated at the port.

Since the Port administers a reasonable, nondiscriminatory policy in conformity with South Carolina state law, the Complaint, in essence, asks the Commission to review the reasonableness of, and preempt, state law regarding gaming within its borders. The Shipping Act does not confer such authority on the Commission. Instead, Congress allows individual states to prohibit gambling vessels from operating via the ports and territorial waters of each individual state.

Further, Maritime Services has failed to demonstrate either to the SPA or to the Commission that it is qualified to operate the services it proposes. Despite the allegation in paragraph 1 of the Complaint that it is a "common carrier engaged in the business of providing transportation of passengers for hire," the SPA could find no evidence that the Commission has issued Maritime Services a Certificate of Financial Responsibility (Performance), which a passenger carrier must have even before it begins to hold out or advertise services. Nor does it appear to qualify for operations under Coast Guard regulations, since the SPA could find no evidence that Maritime Services has obtained the required Oil Pollution Certificate.[1] The SPA has the right to insist that vessels using its facilities are qualified, and Complainant has not shown that it is. Complainant's failure to follow even the most fundamental Commission rules, the requirement to verify complaints, further shows a disposition towards ignoring the rules.

Finally, the Eleventh Amendment of the U.S. Constitution prohibits the Commission from awarding reparations against

[1] Counsel for the SPA has contacted the Coast Guard, which reported that Complainant does not have the required Oil Pollution Certificate. Although the vessel's owner has such a certificate, ordinarily, a charterer must also establish its financial responsibility for water pollution.

the SPA, an instrumentality and agency of the State of South Carolina. Even for those controversies within the Commission's jurisdiction (and this one is not) the Commission cannot, consistent with the Eleventh Amendment, make a state agency pay damages to a private company.

The Presiding Officer should dismiss the Complaint because it fails properly to invoke the Commission's jurisdiction. The SPA further asks the Commission to grant such other relief as it deems proper in the circumstances.

I. Maritime Services' vessel, the TROPIC SEA, is a gaming vessel and its operation is prohibited.

Maritime Services alleges that the SPA's denial of berthing space was unreasonable in that the SPA allegedly permits similar vessels to berth at the Port of Charleston. This is not true. The SPA policy permits passenger vessels to berth so long as their primary purpose is not gambling, consistent with South Carolina law and the SPA's policy.

> The SPA adopted the following policy on gaming vessels in 1988:
>
> It is the policy of the South Carolina State Ports Authority to provide facilities for cruise vessels. Cruise facilities are not however to be used in any way for the promotion of gambling or gaming junkets. Although most cruise ships have small casinos on board which are open when on the high seas these facilities constitute a very small percentage of the overall recreational facilities available to the passenger and can in no way be construed as the primary activities offered or as the purpose of the cruise.
>
> No cruise line or company shall be allowed through its facilities offered or promotion effort to make gaming the primary purpose of its cruises. Any

> intimation that such a plan or effort is proposed or in effect will be grounds for immediate cancellation of all agreements with the line or company.

This policy reflects the values of the citizens of the State of South Carolina and the City of Charleston.[2]

Under that policy, the SPA has permitted passenger cruise vessels to make port calls and use facilities at the Port of Charleston. The vast majority of passenger vessel calls are routine embarkation, disembarkation, or port calls of cruise vessels on international journeys — vessels having overnight accommodations for every passenger and devoting most deck space to activities other than gambling. Before permitting the two 1999 cruises referred to in paragraph 22 of the Complaint, the SPA sought and received from Carnival Cruise Lines written assurance that the primary purpose of those cruises was to promote travel on Carnival's cruises, that the majority of its revenues derive from sources other than gambling, and that Carnival would not promote the cruises as gambling junkets.[3]

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[2] Exhibit A is a copy of some relevant South Carolina statutes: S.C.Code Ann. §§ 16-19-10 to 16-19-30 (prohibiting lotteries); 16-19-40 (prohibiting games of chance or gambling devices); 16-19-50 (prohibiting gaming tables); 16-19-60 (prohibiting coin-operated pinball machines); 16-19-120 to 16-19-130; 12-21-2710 to 12-21-2720 (Law. Co-op. 1976 & Supp. 1997). Exhibit B is a copy of S.C. Const. Art. XVII, § 7, which prohibits lotteries.
See also, Exhibit C, a copy of the City of Charleston Code §§ 21-176 and 21-179, prohibiting, *inter alia*, "gaming vessels," and the use and possession of gambling devices on "day cruises." The TROPIC SEA meets the definition of a "gaming vessel" under the ordinance because it does not provide overnight accommodations for all its passengers, and it is not primarily engaged in U.S. domestic or foreign transportation, unlike the Carnival Cruise Line vessels.

[3] *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976) ("Legislatures may . . . adopt[ ] regulations that only partially ameliorate a perceived evil, . . . deferring complete elimination of the evil to future regulations."); *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990) (Legislature is not required to eliminate all evils in order to legislate against some).

By contrast, the TROPIC SEA cannot meet any of these tests and its proposed operations are clearly distinguishable. The TROPIC SEA is a gaming vessel. Although it can carry 800 people or more, it has overnight accommodations for only about 200. Unlike the occasional promotional tours Carnival and others have offered, Complainant apparently intends to make regular gambling junkets,[4] which is prohibited by South Carolina law and SPA policy.

II. Federal law explicitly permits states to regulate gaming vessels and the Commission has no authority to review state regulation.

In refusing to permit Maritime Services' gaming vessel use of SPA port facilities, the SPA has acted in accordance with relevant federal and state law.[5] In the Johnson Act,[6] Congress has explicitly recognized the preeminent state interests in controlling gambling and has sought to extend, not curb, state police power in this field.[7] Recent amendments to the Johnson Act confirm this explicit recognition.[8] The Shipping Act contains no authority to alter this statutory framework.

The Johnson Act reverses the ordinary preemption rules with respect to conflicting state and federal laws by

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[4] Complaint, paragraphs 8 and 9.

[5] Exhibit D, 15 U.S.C. § 1175(b)(2)(A). *See, e.g.*, Exhibits A and B. *See also Leisure Time Cruise Corp., v. Town of Barnstable*, 1999 WL 613464, *5 (D.Mass. 1999) (citing *Padavan v. City of New York*, 685 N.Y.S.2d 35, 35-36 (N.Y. App.Div. 1999) (holding that 15 U.S.C. § 1175 "cannot be understood to deprive . . . municipalities of the prerogative, in the exercise of their police powers, to reasonably regulate the conduct of shipboard gambling businesses operating from within their jurisdictional bounds")).

[6] The Johnson Act is codified at 15 U.S.C. § 1175, and is reprinted in Exhibit D.

[7] *Casino Ventures v. Stewart*, 183 F.3d 307, 311 (4th Cir. 1999) (Exhibit E).

[8] *Id.* (citing 15 U.S.C. § 1175(a)-(b)).

expressly declaring Congress' intent to defer to state law.[9] The Act permits South Carolina to determine whether to admit gaming vessels into its waters. The statute provides:

> Section 1175. SPECIFIC JURISDICTIONS WITHIN WHICH MANUFACTURING, REPAIRING, SELLING, POSSESSING, ETC., PROHIBITED; EXCEPTIONS
>
> (a) It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.
>
> (b) Exception.
>
> (1) In general. Except as provided in paragraph (2), this section does not prohibit
>
> (A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;
>
> (B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if—

[9] Cf. *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 499 (interpreting a similar provision in the McCarran-Ferguson Act by which Congress restored the supremacy of the States over insurance regulation); *Blackfeet Nat. Bank v. Nelson*, 171 F.3d 1237, 1245 (11th Cir. 1999) (interpreting Congressional deference to the States in the McCarran-Ferguson Act); *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (3d Cir. 1988) (federal law provides for exclusive state regulation of the business of insurance).

> (i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and
>
> (ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession;
>
> (2) Application to certain voyages
>
> (A) General rule. Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.[10]

Accordingly, since South Carolina has numerous statutes prohibiting and regulating gaming devices within its territory, any such activities are also federal crimes under section 1175(a). On July 6, 1999, the U.S. Court of Appeals for the Fourth Circuit upheld South Carolina's right to prohibit gambling on gaming vessels beyond South Carolina's three-mile territorial waters, rejecting the argument that federal law had preempted South Carolina law.[11] There, as here, the plaintiff sought to operate a gaming vessel. The court held that South Carolina's prohibition of such an operation is "aimed at promoting the welfare, safety, and morals of South Carolinians," and is "a well-recognized exercise of state policy power."[12]

[10] Exhibit D, 15 U.S.C. § 1175(b)(2)(A).
[11] *Casino Ventures, supra*, 183 F.3d at 311-13.
[12] *Id.*

In effect, the Complaint seeks Commission review of state law and policy in an area that Congress has specifically left to South Carolina. To the extent that the Complaint alleges discrimination based on an improper interpretation of state laws prohibiting gaming, it does not provide a basis for Commission review. Rather, the proper forum for the interpretation of South Carolina law in areas expressly reserved to the states is in a South Carolina state court.

In reality, the Complainant is asking the Commission to strike down state and federal laws under the guise of applying the non-discrimination provision of the Shipping Act. However, the SPA policy towards gaming vessels and the statutes underlying this policy are rational, do not violate any fundamental rights, and do not single out a suspect class for disparate treatment.[13] Accordingly, under federal and South Carolina state law, the SPA may treat illegal gaming activity differently from legal shipping activity.

Congress has deferred regulation and the outright prohibition of gaming vessels to the individual states. Any attempt by the Commission to interfere with this statutory scheme would likely violate the first prong of *Chevron*.[14] Further, the Complaint cites no basis in the Shipping Act for the Commission to grant Complainant any relief from these federal and state prohibitions on its gaming activities.

Complainant's bald allegation that the TROPIC SEA is a cruise ship and that it plans to make regular cruises to the Bahamas is apparently a fiction created in an attempt to establish federal jurisdiction. A voyage from Charleston to

[13] "The Constitution does not require things which are different in fact . . . to be treated as though they were the same." *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997) (citing *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

[14] *Nelson*, 171 F.3d at 1240-44 (finding Comptroller's interpretation of federal statute unreasonable, court allows state regulation of activity).

the Bahamas would take at least 24 hours. But the TROPIC SEA is classified as a ferry,[15] and cannot provide overnight accommodations for all its passengers. The Commission should reject this transparent attempt to circumvent the Johnson Act. A vessel whose primary purpose is gambling differs markedly from those used for cruises, where there are accommodations for each passenger, and where gambling is but a small part of the on-board entertainment. In the Johnson Act, Congress drew a similar distinction involving cruise vessels in the State of Alaska, by prohibiting that State from outlawing gaming on vessels providing "sleeping accommodations for all of its passengers."[16]

III. The Complaint provides no basis for its request that the Commission file suit in Federal District Court against the SPA.

Under section 11(h) of the Shipping Act, the proper party to seek an injunction is Complainant, not the FMC. Section 11(h)(2) unambiguously states that a complainant may seek an injunction after it has filed a Complaint with the FMC. On the other hand, it appears that the FMC must initiate an investigation before seeking an injunction. Section 11(h)(1). Complainant cites no reason why it should consume the Commission's resources to obtain a remedy that it can obtain for itself.[17] Its November 11, 1999 letter to Presiding Officer Norman D. Kline so acknowledged, and stated that "it

[15] *See, The Register of Ships* (Lloyds, August 13, 1999).

[16] Exhibit D, 15 U.S.C. § 1175(c)(1). As such, Congress, itself, has differentiated between vessels providing sleeping accommodations to all passengers and those which do not provide such accommodations.

[17] A Westlaw search of U.S. District Court cases and the Federal Maritime Commission database (FMRT-FMC) has failed to reveal a single case in which the Commission sought an injunction based on a private party's complaint under § 1710(h)(1). Rather, the Commission has consistently referred complainants to § 1710(h)(2). *See, e.g., TAK Consulting Engineers v. Sam Bustania, et al.*, 1998 WL 940847, *5 n. 2 (F.M.C. 1998); *Investigation and Relief from Unlawful Actions of the Trans-Atlantic Agrement*, 1994 WL 122248, *10 (F.M.C. 1994).

is likely" that Complainant will seek its own injunction, without using FMC resources.[18]

In any event, Maritime Services is not entitled to an injunction. Courts examine four factors in determining whether to grant an injunction: (1) Has Maritime Services made a strong showing that it is likely to prevail on the merits? (2) Has Maritime Services shown that without relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest? [19] Maritime Services, however, cannot meet any of the four factors.

In particular, Maritime Services has failed to show any likelihood of prevailing on the merits.[20] No discrimination has taken place. The TROPIC SEA is a gaming vessel, and is objectively distinguishable from other passenger vessels that call at the Port of Charleston. Moreover, the SPA's actions are consistent with the prevailing view that state and local bans on gaming vessels are lawful under the Johnson Act.[21] Finally, Maritime Services fails to allege that it provided the SPA, the Commission, or the Coast Guard the information they respectively require before granting permits to offer services, operate, or berth a passenger vessel.

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[18] Attached as Exhibit F.

[19] *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[20] In *Casino Ventures v. Stewart*, 23 F.Supp.2d 647, 652 (D.S.C. 1998), the plaintiff, who intended to operate a gaming vessel from Georgetown, South Carolina, sought a preliminary and permanent injunction enjoining South Carolina law enforcement officials from enforcing state criminal statutes. The court granted the plaintiff declaratory relief based upon a finding of federal preemption, but refused to grant a preliminary or permanent injunction. The finding of federal preemption was reversed on appeal. *Casino Ventures* 183 F.3d at 307.

[21] *Casino Ventures* 183 F.3d at 312-13; *Butterworth v. Chances Casino Cruises, Inc.*, 1997 WL 1068628 (M.D.Fla. 1997); *Padavan v. City of New York*, 685 N.Y.S.2d 35, 35-36 (N.Y.App.Div. 1999).

IV. Maritime Services has not established that it is a common carrier or that SPA is a "marine terminal operator" under the Shipping Act of 1984.

Complaints like this one, filed under the Shipping Act of 1984, can only be brought regarding matters that are subject to the Commission's jurisdiction. Maritime Services, as Complainant, bears the burden of proof to demonstrate that it is a common carrier within the meaning of the Shipping Act. However, Maritime Services has failed to allege any factual basis for finding Maritime Services to be a common carrier — a necessary prerequisite for Commission jurisdiction. Thus, the SPA respectfully requests the Presiding Officer to dismiss Maritime Services' Complaint under Rule 73.[22]

"The Shipping Act provides that only those persons engaged in the business of furnishing terminal facilities are subject to the Commission's jurisdiction."[23] Under the Shipping Act of 1984, common carrier service is a prerequisite for the exercise of Commission jurisdiction.[24] The Shipping Act defines a "marine terminal operator" as a person engaged "in the business of furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with a common carrier* and a water carrier . . . ."[25] In this case, Maritime Services fails to establish jurisdiction in that it fails to allege or demonstrate that Maritime Services is such a carrier. As such, Maritime Services has failed to allege that the SPA ever furnished, was asked to furnish, or refused to furnish marine terminal services *in connection with either a common carrier or a water carrier*. Complainant bears the

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[22] Rule 73 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.73 (1999).

[23] *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 919 F.2d 799, 802 (1st Cir. 1990).

[24] Shipping Act of 1984, § 3(14); 46 U.S.C. app. § 1702(14); *River Parishes Co. v. Ormet Primary Aluminum Inc.*, 1999 WL 125991 (1999).

[25] 46 U.S.C. app. § 1702(14); Shipping Act of 1984, § 3(14) (emphasis added).

burden of proof in establishing the Commission's jurisdiction.[26]

Case law establishes that a person may be subject to Commission jurisdiction with respect to some of its activities, but not with respect to others.[27] The SPA's status as a "marine terminal operator" in the Port of Charleston does not subject every activity to the Shipping Act's oversight, in particular, its relations with vessel operators that are not common carriers under the Shipping Act. Put another way, "the Commission has found in numerous cases that it does not have jurisdiction over everything that a marine terminal operator does."[28] The mere act of a state agency administering a policy that reflects federal and state prohibitions with regard to illegal gaming voyages does not fall within the definition of "marine terminal operator."

Further, because Maritime Services has failed to comply with the FMC's regulations concerning financial responsibility, it is not eligible to be a common carrier within the meaning of the Shipping Act. A common carrier is "a person holding itself out to the general public to provide transportation by water."[29] Yet because Maritime Services has not yet obtained a Certificate of Financial Responsibility (Performance), it is not authorized to hold itself out to provide such transportation.[30] Maritime

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[26] *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1222 (1990).

[27] *Puerto Rico Ports Auth.*, 919 F.2d at 803 (furnishing terminal facilities in one port does not make a company a marine terminal operator within the meaning of the Shipping Act at a different port).

[28] *Burlington Northern R.R. Co. v. M.C. Terminals, Inc.*, 26 S.R.R. 683, *rev'd on other grounds*, 26 S.R.R. 934 (F.M.C. 1993); *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 621, 625 (1997).

[29] Shipping Act § 3(6) (definition of a common carrier).

[30] 46 C.F.R. § 540.3 ("No person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person").

Services' failure to do so is fatal because it bears the burden of showing that its invocation of Commission jurisdiction is proper.[31]

V. Under the Eleventh Amendment of the U.S. Constitution, the SPA is a state agency and immune from suits in federal court.

The SPA is entitled to Eleventh Amendment immunity from suit.[32] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This language has resulted in the presupposition that "each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the State's] consent."[33] "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional

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[31] 5 U.S.C. § 556(d); 46 C.F.R. § 502.155 (burden of proof is on the proponent of an order); *River Parishes Co. v. Ormet Primary Aluminum Corp., 1999* WL 125991 (1999); *California Shipping Line*, 25 S.R.R. at 1222.

[32] *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1055 (4th Cir. 1995) (finding the State Ports Authority to be an alter ego of the State of South Carolina under *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994)); *see also Auer v. Robbins*, 519 U.S. 452, 455 n.1 (1997) (reaffirming "arm of state" test for purposes of Eleventh Amendment analysis).

[33] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54 (1996); *Port Auth. Trans-Hudson Corp. v. Fenney*, 495 U.S. 299, 304 (1990) (citing numerous Supreme Court decisions holding States are immune from suits brought in federal courts by their own citizens).

authorization of suits by private parties against unconsenting States."[34]

Under the Eleventh Amendment, Maritime Services cannot bring an action for monetary damages before the Commission for alleged injuries arising from the SPA's activities. In its Complaint, Maritime Services admitted that the SPA is "a political agency, entity, body and/or subdivision of the State of South Carolina."[35] Under South Carolina law, the SPA is a state agency with jurisdiction over certain South Carolina harbors and seaports.[36] The SPA is responsible for developing and improving those harbors and seaports, including promoting shipping and commerce.[37] The SPA also has jurisdiction to investigate rates and rate structures affecting the shipment of freight[38] and to supervise terminal facilities to assure the security and accommodation of the public.[39]

Although the Commission can investigate a state government's practices that fall under the Shipping Act, the Eleventh Amendment prohibits individuals from "suing" a state for reparations or injunctive relief under the "Judicial powers of the United States." In *California v. United States*[40] the Supreme Court upheld federal oversight of state activities that fall under the Interstate Commerce Clause; however, it does not allow an individual

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[34] *Seminole Tribe*, 517 U.S. at 72 (rejecting view that congressional statutes adopted under the Interstate Commerce Clause can limit the scope of Eleventh Amendment immunity).

[35] Complaint at 2.

[36] S.C. Code Ann. §§ 54-3-120 (jurisdiction over ports) and 54-3-810 (Law Co-op. 1992) (jurisdiction over the harbor and bays of Charleston and the rivers and creeks flowing into them).

[37] S.C. Code Ann. § 54-3-130 (Law Co-op. 1992) (purposes of Authority).

[38] *Id.*

[39] S.C. Code Ann. § 54-3-410 (Law Co-op. 1992) (obligation to supervise terminal facilities).

[40] 320 U.S. 577 (1944).

to sue a state.[41] Rather, in *California*, the district court and the Supreme Court upheld the power of a federal regulatory body under the Interstate Commerce Clause to investigate a state agency's practices.[42] An investigation, however, is entirely different than the filing of a suit for reparations.[43]

Further, a state does not consent to suit in federal court merely by consenting to suit in courts of its own creation.[44] Nor does it consent to suit in federal court by stating its intention to sue or be sued,[45] or even by authorizing suits in any court of competent jurisdiction.[46] Thus, the SPA has not waived its Eleventh Amendment immunity in this proceeding.

In addition, the Constitution prohibits the federal government from exercising its powers in a manner that allows Maritime Services to sue the State of South Carolina under the "Judicial power of the United States." As such,

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[41] *See Seminole Tribe*, 517 U.S. at 71-74 (The powers granted to Congress in Article I of the U.S. Constitution cannot be used to circumvent limitations placed upon federal jurisdiction by the Eleventh Amendment of the U.S. Constitution).

[42] *California v. United States*, 46 F.Supp. 474 (N.D.Cal. 1942) (upholding authority of the United States Maritime Commission to conduct investigation and order State's compliance with Shipping Act).

[43] *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993) (Eleventh Amendment serves to avoid the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."); *In re Maritime Administration*, 1991 WL 383090 (Petition No. P1-90) (acknowledging the judicial function of the Federal Maritime Commission); *Sea Dragon Navigation Ltd., et al.*, 1998 WL 940829, *6 (investigation commenced by regulatory agency to inform itself regarding possible violations of the Shipping Act is not derived from judicial function).

[44] *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S.Ct 2219, 2226 (1999) (citing *Smith v. Reeves*, 178 U.S. 436, 441-445 (1900)).

[45] *College Sav. Bank*, 119 S.Ct. at 2226 (citing *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981)).

[46] *College Sav. Bank*, 119 S.Ct. at 2226 (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946)).

the Constitution prohibits Congress from passing a statute authorizing Maritime Services to file a Complaint before the Commission and, thereby, sue the State of South Carolina for damages and injunctive relief. The Eleventh Amendment is not limited to the Judicial Branch — it encompasses the entire Federal Government. It would be a remarkable result to allow Congress to create a cause of action before a quasi-judicial administrative tribunal where the Constitution expressly prohibits bringing the same cause of action under the "Judicial power of the United States." Ultimately, the Commission must rely on the courts to enforce its orders and, therefore, any Commission reparations order would therefore be unenforceable. [47] Thus, the SPA is immune from this suit for damages filed by Maritime Services.

VI. Maritime Services has not met the conditions precedent to operating and berthing a vessel and has not shown that it is disposed to comply with the Commission's rules.

Parties that invoke the Commission's jurisdiction must themselves comply with applicable legal requirements. First, Commission Rule 62 requires a complaint to be verified to give the Commission reasonable assurance that a principal of the party has reviewed the allegations and believes them to be true.[48] The Complaint in this docket is unverified. This failure alone is sufficient to support dismissal.

In addition, Complainant has apparently failed to fulfill two conditions precedent to arranging, advertising, offering, or providing passage, obtaining berthing space, or operating its vessel. First, the FMC has not issued Complainant a Certificate of Financial Responsibility

[47] 46 U.S.C. app. § 1714.
[48] 46 C.F.R. § 502.62.

(Performance). Failure to attain a Certificate is a *per se* bar to arranging to carry passengers at U.S. ports.[49] Second, the Coast Guard has apparently not issued Complainant an Oil Pollution Certificate to ensure it will be financially responsible for water pollution.[50] The SPA has investigated and found no evidence that Complainant possesses either certificate. Without these certificates, Complainant cannot lawfully participate in its proposed activities. Because it cannot lawfully operate its vessel, Maritime Services cannot demonstrate a realistic danger of sustaining any injury as a result of the SPA's actions. Moreover, the Commission should not allocate its sparse resources in a case where the alleged harm is conjectural and hypothetical at best.

VII. The Complaint wrongfully asks the Commission to review a decision made under recognized state police power. The Presiding Officer should dismiss the Complaint.

The SPA respectfully requests the Presiding Officer to dismiss the Complaint under Rule 73,[51] since it raises no issues cognizable under the Shipping Act of 1984. Maritime Services has failed to meet its burden of proving that its effort to invoke the Commission's jurisdiction is proper. The SPA also moves the Presiding Officer to hold that the SPA is immune from this suit under the Eleventh Amendment of the U.S. Constitution because the SPA is a state agency and this matter is before a federal tribunal. Finally, the SPA moves the Presiding Officer to dismiss the Complaint because Maritime Services has not met the conditions precedent to operating and berthing a vessel.

[49] 46 C.F.R. §§ 540.3, 540.22.
[50] 33 C.F.R. § 138.12.
[51] 46 C.F.R. § 502.73.

Respectfully submitted,

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ATTORNEYS FOR SOUTH
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AUTHORITY

[Certificate of Service Omitted in Printing]

[Exhibits to the Motion to Dismiss Consisting of the Following were Omitted in Printing:

A. Code of Laws of South Carolina 1976 Annotated, sections:

16-19-10. Setting up lotteries.

16-19-20. Adventuring in lotteries.

16-19-30. Selling lottery tickets.

16-19-40. Unlawful games and betting.

16-19-50. Keeping unlawful gaming tables.

16-19-60. Legality of coin-operated nonpayout machines with free play feature.

16-19-120. Officers shall destroy gambling devices after confiscation.

16-19-130. Betting, pool selling, bookmaking and the like are prohibited.

12-21-2710. Types of machines and devices prohibited by law; penalties.

12-21-2720. License for coin-operated devices or machines; license tax; maximum municipal license charges; special one-time interim fees; game located on watercraft or vessel. (Appearing in the joint appendix filed in the court of appeals at pages 51-60).

B. South Carolina Constitution: Article XVII, "Miscellaneous Matters"(Appearing in the joint appendix filed in the court of appeals at pages 61-66).

C. Ordinance of the Code of the City of Charleston, South Carolina, subsection 21-179, "Gambling devices on vessels prohibited;" Ordinance of the Code of the City of Charleston, South Carolina, subsection 21-176(c), "Prohibition on the operation of any gaming vessel from facilities within the corporate limits of the city" (Appearing in the joint appendix filed in the court of appeals at pages 67-71).

D. United States Code Annotated, Title 15, Commerce and Trade, Chapter 24, Transportation of Gambling Devices, section 1175 (Appearing in the joint appendix filed in the court of appeals at pages 72-75).

E. *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999) (Appearing in the joint appendix filed in the court of appeals at pages 76-83).

F. Letter from George M. Earle, counsel for South Carolina Maritime Services, to Norman Kline, Administrative Law Judge, Federal Maritime Commission, dated November 11, 1999 (Appearing in the joint appendix filed in the court of appeals at page 84).]

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Dec. 6, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

NOW COMES South Carolina Maritime Services, Inc. ("Maritime Services"), as Complainant, and files this Response to the Motion to Dismiss of South Carolina State Ports Authority ("Ports Authority"), Respondent herein.

INTRODUCTION

The Ports Authority has engaged in a pattern of discriminatory practices in its role as marine terminal operator in the Port of Charleston, South Carolina, and Maritime Services filed a complaint seeking a Federal Maritime Commission ("Commission") investigation of the Ports Authority's practices, reparations for past discrimination, and injunctive relief (See Complaint of Maritime Services). The Ports Authority has unreasonably prohibited Maritime Services from using its berthing facilities for its vessel, the M/V TROPICANA, a/k/a the M/V TROPIC SEA, based on the fact that Maritime Services intends to operate "cruises to nowhere" on the vessel. Yet, the Ports Authority has permitted and continues to permit vessels operated by

Carnival Cruise Line ("Carnival") to carry out "cruise to nowhere" operations from the Port of Charleston.

In its Motion to Dismiss, the Ports Authority cites several South Carolina statutes as support for its claim that these "cruise to nowhere" activities are prohibited, despite the fact that at least one South Carolina court has held these statutes to be inapplicable to such activities. (See Order of the Honorable A. Victor Rawl, Chief Administrative Judge, Ninth Judicial Circuit, in *Stardancer Casino, Inc. v. Stewart*, Calendar No. 99-CP-10-2671, Court of Common Pleas, County of Charleston, State of South Carolina, attached herewith as Exhibit "A"). The Ports Authority then attempts to shield itself from action by the Federal Maritime Commission into its actions by claiming that the Commission is not vested with the authority to investigate this controversy and by claiming that the Ports Authority is immune from any Commission action under the Eleventh Amendment of the United States Constitution. Lastly, the Ports Authority claims that Maritime Services has not satisfied conditions precedent to common carrier status, thereby precluding the Commission from hearing this action.

The Shipping Act of 1984 clearly vests the Commission with authority to investigate and direct payment of reparations, as well as authority to subsequently file suit for injunctive relief against marine terminal operators - such as the Ports Authority - who fail to abide by the provisions of the Shipping Act. Moreover, actions taken by the Commission against the Ports Authority are not subject to the Eleventh Amendment. Therefore, the Commission is fully authorized to hear this matter.

ARGUMENT AND CITATION OF AUTHORITY

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[Sections I - IV Omitted in Printing]

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V. The Ports Authority does not enjoy Eleventh Amendment immunity in suits by federal regulatory agencies

The Federal Maritime Commission is authorized to pursue actions against state agencies. Maritime Services has requested that the Commission seek an injunction in this case. As the Ports Authority concedes in its Motion to Dismiss, the Supreme Court has upheld the power of a federal regulatory body to investigate a state agency's practices. *California v. United States*, 320 U.S. 577 (1944). The Ports Authority cites caselaw for the proposition that States are immune from suit in federal district court; however, the Ports Authority cites no authority for the proposition that states are immune from actions by federal regulatory bodies.

The Federal Maritime Commission's powers do not end at the investigative phase, however, for the Commission is empowered to bring suit in Federal District Court against the Ports Authority, despite its status as a state agency. State port agencies do not enjoy immunity from actions by the Federal Maritime Commission in Federal District Court. *Maryland Port Admin. v. Fed. Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. 1998). (Attached herewith as Exhibit "E"). In the *Maryland Port Admin.* case, the Federal Maritime Commission brought suit in Federal District Court against the state port agency in Maryland for discriminatory practices in its preferences for one carrier over another in the provision of port services at its terminal. *Id.* at *1. The jurisdiction of the Federal Maritime Commission in prosecuting the suit was explicitly upheld under 46 U.S.C. app 1713. *Id.* at *3. The Court of Appeals implicitly upheld the district court's jurisdiction over the Federal Maritime Commission's action against the state ports authority of Maryland when it affirmed in part the opinion of the district court and remanded the case for reconsideration by the district court. *Id.* at *6.

Maritime Services submits that the Ports Authority consented to suit before the Commission district court by participating in an industry regulated by the Shipping Act, in which Congress explicitly stated that participating parties would be subject to suit in federal district court. By engaging in operations as a marine terminal operator, the Ports Authority is obligated to abide by the provisions of the Shipping Act of 1984. The Shipping Act provides that the Commission may bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act 46 U.S.C. app. 1710(h)(1). This is clear, explicit language subjecting any party participating in the activities regulated by the Shipping Act to suit in federal district courts. Through its operation of a marine terminal under the provisions of the Shipping Act, the Ports Authority consented to suit in federal district court, and thus any suit brought by the Commission is authorized.

* * * * *

[Section VI Omitted in Printing]

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CONCLUSION

The Federal Maritime Commission is fully authorized to entertain this action pursuant to the powers granted to it under the Shipping Act. The Ports Authority's discriminatory practice of preferring certain "cruise to nowhere" operations over others is a violation of 46 U.S.C. 1709(b)(10) and 1709(d)(4). The Commission is therefore authorized to pursue an investigation, direct payment of reparations and file suit in federal district court under 46 U.S.C. 1710(h). The fact that the Ports Authority is a state agency is immaterial in this case, because state entities do not enjoy Eleventh Amendment immunity from actions by federal regulatory bodies. For the foregoing reasons, the Complainant requests that the Commission deny the

Respondent's Motion to Dismiss.

Respectfully submitted this 4 day of December, 1999.

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[Exhibits to the Response Consisting of the Following were Omitted in Printing:

A. *Stardancer Casino, Inc. v. Stewart*, Court of Common Pleas, County of Charleston, State of South Carolina, Case No. 99-CP-10-2671, Order on Declaratory Judgment, dated October 8, 1999 (Appearing in the joint appendix filed in the court of appeals at pages 96-110).

B. Photocopied advertisements for Carnival Cruise Lines, including "1-Night 'Nowhere' cruise" from Charleston, South Carolina (Appearing in the joint appendix filed in the court of appeals at pages 111-114).

C. *Reed v. San Francisco*, 10 Cal. App. 4th 572, 12 Cal. Rptr.2d 647 (Court of Appeal, First District, Division 5, California, 1992); *New York Shipping Association v. Federal Maritime Commission*, 854 F.2d 1338 (D.C. Cir. 1988) (Appearing in the joint appendix filed in the court of appeals at pages 115-156).

D. Vessel Certificate of Financial Responsibility (Water Pollution) No. 839547-13, for the vessel TROPICANA, issued by the United States Coast Guard (Appearing in the joint appendix filed in the court of

appeals at pages 157-158).

E. *Maryland Port Administration v. Federal Maritime Commission*, 1998 WL 716035 (4th Cir. 1998) (Appearing in the joint appendix filed in the court of appeals at pages 159-164).

F. Verification of Frank Guarino, President of South Carolina Maritime Services, Inc., dated October 28, 1999 (Appearing in the joint appendix filed in the court of appeals at pages 165-166).]

[Certificate of Service Omitted in Printing]